

Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals A

COURT OF APPEAL (PUTRAJAYA) — APPLICATION NOS W-02-992 OF 2004, W-03-117 OF 2004 AND W-03-116 OF 2004 B
TENGKU BAHARUDIN SHAH, ABDULL HAMID EMBONG AND
KN SEGARA JJCA
21 OCTOBER 2008

Arbitration — Stay of proceedings — Application — Dispute in relation to performance and interpretation of agreement — Whether dispute fell within ambit of arbitration clause — Attempt to circumvent arbitration clause by instituting action against party to contract together with other third parties — Whether arbitration clause applicable — Whether applicable law Arbitration Act 2005 or Arbitration Act 1952 C
D

Arbitration — Stay of proceedings — Principles applicable — Whether granting of stay mandatory where requirements satisfied — Arbitration Act 2005 s 10 E

Civil Procedure — Striking out — Statement of claim — Claim for conspiracy — Failure to plead agreement to conspire and object of conspiracy — Whether cause of action in tort of conspiracy established — Whether statement of claim frivolous and vexatious — Whether fit and proper case for striking out F

Tort — Conspiracy — Elements of — Agreement to injure must arise before unlawful act in execution of agreement — Alleged unlawful act said to have occurred in 2000 whereas conspiracy said to have occurred in 2001 — Failure to plead agreement to conspire and object of conspiracy — Whether cause of action for conspiracy established G

The first plaintiff/respondent, Inokom and the second plaintiff/respondent, Quasar Carriage Sdn Bhd ('Quasar') issued a writ claiming damages against the first, second and third defendants/appellants, namely, Renault SA ('Renault'), Tan Chong Motor Holdings Bhd ('Tan Chong') and TC Euro Cars Sdn Bhd ('TC Euro') for breach of contract, breach of fiduciary duties, fraudulent misrepresentation/deceit by Tan Chong to Inokom and Quasar to reject the investment for the Kangoo project and for Renault conspiring with Tan Chong and TC Euro to injure Inokom and Quasar. Renault, Inokom and Quasar had entered into the master agreement with terms and conditions to govern a co-operation on the import and distribution of Renault built up H
I

- A vehicles in Malaysia by Quasar ('Renault project'); and the manufacture, assembly, sale and distribution of a Malaysian national light commercial vehicle ('Inokom project'). Renault also entered into a joint venture agreement with the Berjaya Group Bhd and several other parties, whereupon Renault subscribed to be a minority shareholder in Inokom and agreed that
- B no party shall have any fiduciary obligations to the other. By summons in chambers dated 30 July 2003 (encl 11) Renault applied to stay all proceedings in the suit pending reference of the disputes to arbitration pursuant to s 6 of the Arbitration Act 1952 ('1952 Act'). The learned High Court judge dismissed the application. Renault appealed against this
- C decision. By summonses in chambers dated 31 July 2003 (encl 13) and 1 August 2003 (encl 15), Tan Chong and TC Euro respectively applied to strike out the statement of claim under O 18 r 19 (1)(a) and/or (b) and/or (c) of the Rules of the High Court 1980 and/or the inherent jurisdiction of the High Court. The application was dismissed by the learned High Court judge.
- D Tan Chong and TC Euro respectively appealed against these decisions. The three appeals were heard together.

Held, allowing all the three appeals with costs:

- E (1) The dispute between the parties clearly arose from or in connection with the performance or interpretation of the master agreement relating to: (a) its non-renewal; and (b) in respect of the allegation of breach of fiduciary duties (see para 13).
- F (2) Whether there was a breach of the master agreement was a dispute falling squarely within the ambit of the arbitration agreement found in Article 11 of the master agreement. The fact that Tan Chong and TC Euro had been named as alleged co-conspirators did not change the fact that a mechanism for resolving disputes between Renault, Inokom and
- G Quasar has been agreed upon. Therefore, the mechanism should be rightly invoked and the disputes resolved by arbitration and not by litigation in court. A devious attempt to circumvent Article 11, by instituting an action against Renault jointly with parties not subject to the arbitration clause, should not be encouraged (see paras 15–16).
- H (3) The law governing the arbitration agreement under Article 11 of the master agreement was the Arbitration Act 2005 ('2005 Act'). The 1952 Act no longer had any application if the arbitration commenced pursuant to the master agreement anytime thereafter, because s 51(2) of the 2005 Act provides that it shall be applicable to all proceedings
- I commenced on or after 15 March 2006 (see para 21).
- (4) The provision on stay of court proceedings pending arbitration is found in s 10 of the 2005 Act. The requirement to stay is mandatory unless the court finds that: (a) the arbitration agreement is null and void,

inoperative or incapable of being performed; or (b) there is no dispute between the parties with regard to the matters to be referred (see para 22).

A

- (5) In regard to the tort of conspiracy, the following need to be satisfied at this interlocutory stage: an agreement between two or more persons (ie an agreement between Tan Chong and others); an agreement for the purpose of injuring Inokom and Quasar; that acts done in execution of that agreement resulted in damage to Inokom and Quasar; damage is an essential element and where damage is not pleaded the statement of claim may be struck out. 'Agreement' is not limited to a signed and sealed agreement but any informal agreement, including a combination of efforts of the alleged co-conspirators. It is trite law that the agreement to injure must come first (in other words the agreement should have crystallised), before the alleged unlawful acts are done in execution or pursuant to the agreement (see paras 32–34).

B

C

D

- (6) There could not in law and in fact conceivably have been an agreement or combination or conspiracy between Renault and Tan Chong to injure Inokom and Quasar when the alleged representation was pleaded to have been made in 2000 and the alleged conspiracy was pleaded to have occurred in 2001. There was no cause of action in the tort of conspiracy against Tan Chong (see paras 38 & 40).

E

- (7) There was no allegation of any overt acts carried out by TC Euro in the pleadings and by necessary implication TC Euro had not carried out any overt acts. Besides the absence of allegations of overt acts on the part of TC Euro the statement of claim also failed to plead the agreement between the defendants to conspire and state precisely what was the purpose or what were the objects of the alleged conspiracy. The statement of claim also failed to set forth with clarity and precision the overt acts which are alleged to have been done by each of the alleged conspirators in pursuance and in furtherance of the conspiracy. There was no cause of action in the tort of conspiracy as against TC Euro. The statement of claim was vexatious and frivolous. Just as fraud must be pleaded with great particularity, so must the constituent ingredients of the alleged conspiracy by TC Euro be pleaded (see paras 42–43 & 48).

F

G

H

[Bahasa Malaysia summary]

Plaintif/responden pertama, Inokom dan plaintiff/responden kedua, Quasar Carriage Sdn Bhd ('Quasar') mengeluarkan writ menuntut ganti rugi terhadap defendan/perayu pertama, kedua dan ketiga, iaitu, Renault SA ('Renault'), Tan Chong Motor Holdings Bhd ('Tan Chong') dan TC Euro Cars Sdn Bhd ('TC Euro') untuk kemungkiran kontrak, kemungkiran kewajipan fidusiari, salah nyata fraud/perdayaan oleh Tan Chong terhadap Inokom dan Quasar kerana menolak pelaburan ke atas projek Kangoo dan

I

- A kerana Renault berkomplot dengan Tan Chong dan TC Euro untuk menjejaskan Inokom dan Quasar. Renault, Inokom dan Quasar telah menandatangani perjanjian induk dengan terma-terma dan syarat-syarat untuk mentadbir suatu kerjasama mengimport dan mengedar kenderaan pemasangan Renault di Malaysia oleh Quasar ('projek Renault'); dan
- B pembuatan, pemasangan, penjualan dan pengedaran kenderaan ringan komersial nasional Malaysia ('projek Inokom'). Renault juga menandatangani satu perjanjian usaha sama dengan Berjaya Group Bhd dan beberapa pihak lain, di mana Renault dijadikan pemegang saham minoriti dalam Inokom dan bersetuju bahawa pihak-pihak tidak mempunyai tanggungjawab fidusiari sesama sendiri. Melalui saman dalam kamar bertarikh 30 Julai 2003 (lampiran 11) Renault memohon untuk menangguhkan semua prosiding dalam guaman tersebut sementara menunggu rujukan pertelingkahan tersebut kepada timbang tara berikutan s 6 Akta Timbang Tara 1952 ('Akta 1952'). Hakim Mahkamah Tinggi yang bijaksana menolak permohonan tersebut. Renault merayu terhadap keputusan ini. Menerusi saman dalam kamar bertarikh 31 Julai 2003 (lampiran 13) dan 1 Ogos 2003 (lampiran 15) Tan Chong dan TC Euro masing-masing memohon untuk membatalkan penyata tuntutan di bawah A 18 k 19(1)(a) dan/atau (b) dan/atau (c) Kaedah-Kaedah Mahkamah Tinggi 1980 dan/atau bidang kuasa sedia ada
- E Mahkamah Tinggi. Permohonan tersebut ditolak oleh hakim Mahkamah Tinggi yang bijaksana. Tan Chong dan TC Euro masing-masing merayu terhadap keputusan-keputusan ini. Ketiga-tiga rayuan didengar bersama.

Diputuskan, membenarkan ketiga-tiga rayuan dengan kos:

- F (1) Pertikaian antara pihak-pihak tersebut jelasnya berbangkit daripada atau berkaitan dengan pelaksanaan atau tafsiran perjanjian induk berkaitan dengan: (a) perjanjian tidak diperbaharui; dan (b) berkaitan dengan dakwaan kemungkiran tanggungjawab fidusiari (lihat perenggan 13).
- G (2) Sama ada terdapat kemungkiran terhadap perjanjian induk merupakan pertikaian yang terangkum dalam persetujuan timbang tara terdapat dalam Artikel 11 perjanjian induk. Fakta bahawa Tan Chong dan TC Euro dinamakan sebagai pengkomplot tidak mengubah fakta bahawa
- H mekanisma untuk menyelesaikan pertelingkahan antara Renault, Inokom dan Quasar telahpun dipersetujui. Oleh itu, mekanisma yang betul yang harus diaplikasikan dan menyelesaikan pertelingkahan tersebut melalui timbang tara dan bukannya litigasi di mahkamah. Percubaan licik untuk memintas Artikel 11 dengan memulakan tindakan terhadap Renault bersesama dengan pihak lain yang tidak terikat dengan klausa timbang tara, tidak harus digalakkan (lihat perenggan 15–16).
- I

- (3) Undang-undang yang mentadbir perjanjian timbang tara di bawah Artikel 11 perjanjian induk adalah Akta Timbang Tara 2005 ('Akta 2005'). Akta 1952 tidak lagi beraplikasi jika timbang tara bermula selepas perjanjian induk tersebut kerana s 51(2) Akta 2005 memperuntukkan bahawa Akta 2005 terpakai kepada semua prosiding bermula pada atau selepas 15 Mac 2006 (lihat perenggan 21). A
B
- (4) Peruntukan untuk menangguhkan prosiding sementara menunggu timbang tara terdapat dalam s 10 Akta 2005. Keperluan untuk penangguhan adalah wajib kecuali mahkamah mendapati bahawa: (i) perjanjian timbang tara batal dan tak sah, tidak beroperasi atau tak boleh laksana; atau (ii) tiada pertelingkahan antara pihak-pihak berkaitan hal perkara yang dirujuk (lihat perenggan 22). C
- (5) Berkaitan tort konspirasi, berikut adalah perkara yang perlu dipenuhi pada peringkat interlokutori: suatu perjanjian antara dua orang atau lebih (iaitu perjanjian antara Tan Chong dan lain-lain); suatu perjanjian bagi tujuan menjejaskan Inokom dan Quasar; bahawa tindakan tersebut dilakukan dalam pelaksanaan perjanjian tersebut mengakibatkan kerugian kepada Inokom dan Quasar; kerugian merupakan unsur penting dan apabila kerugian tidak diplidkan, penyata tuntutan boleh dibatalkan. 'Perjanjian' tidak terhad kepada perjanjian yang ditandatangani dan dimeterai tetapi apa-apa perjanjian tak formal, termasuklah gabungan usaha pengkomplot yang didakwa. Adalah menjadi undang-undang mantap bahawa perjanjian untuk menjejaskan sesuatu hendaklah wujud terlebih dahulu (dalam kata lain perjanjian tersebut telah terbentuk), sebelum tindakan yang menyalahi undang-undang seperti didakwa dilaksanakan berikutan perjanjian tersebut (lihat perenggan 32 & 34). D
E
F
- (6) Tidak harus, dari segi undang-undang dan fakta dapat difikirkan wujudnya satu perjanjian atau gabungan atau konspirasi antara Renault dan Tan Chong untuk menjejaskan Inokom dan Quasar apabila perwakilan yang didakwa itu diplidkan dibuat dalam tahun 2000 dan konspirasi yang didakwa diplidkan berlaku pada 2001. Tiada kausa tindakan dalam tort konspirasi terhadap Tan Chong (lihat perenggan 38 & 40). G
H
- (7) Tiada dakwaan terhadap perbuatan yang terang-terangan dilakukan oleh TC Euro dalam pliding dan menerusi implikasi yang tidak dapat dielakkan TC Euro tidak melaksanakan apa-apa perbuatan yang terang-terangan. Selain daripada ketiadaan dakwaan perbuatan terang-terangan di pihak TC Euro penyata tuntutan juga gagal memplidkan perjanjian antara defendan-defendan berkomplot dan menyatakan dengan jelas tujuan atau objektif konspirasi yang didakwa. Penyata tuntutan juga gagal menyatakan dengan jelas dan terperinci perbuatan-perbuatan terang-terangan tersebut yang didakwa telah I

- A dilakukan oleh setiap pengkomplot berikutan dan untuk meneruskan konspirasi tersebut. Tiada kausa tindakan dalam tort konspirasi terhadap TC Euro. Penyata tuntutan adalah menyusahkan dan remeh. Sepertimana fraud mesti diplidkan dengan begitu perinci, begitu juga dengan perawis penting dakwaan konspirasi oleh TC Euro mesti diplidkan (lihat perenggan 42–43 & 48).]
- B

Notes

- C For cases on application for stay of proceedings, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1488–1527.
- For cases on elements of conspiracy, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 64–67.
- For cases on principles applicable in stay of proceedings, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1537–1549.
- D For cases on statement of claim, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 6750–6786.

Cases referred to

- E *Yap JH v Tan Sri Loh Boon Siew & Ors* [1991] 4 CLJ (Rep) 243, HC (refd)

Legislation referred to

- Arbitration Act 1952 ss 6, 25(2)
- Arbitration Act 2005 ss 10, 51(2)
- F Rules of the High Court 1980 O 18 rr 19(1)(a), (b), (c)

Appeal from: Civil Suit Nos S2–22–822 of 2003, S-22–822 of 2003 and S2–22–922 of 2003 (High Court, Kuala Lumpur)

- G *Tommy Thomas (KY Chew and Elaine Yap with him) (Wong & Partners) for the appellant in Appeal No W-02–992 of 2004.*
KM Chan (Veronica Ong with him) (Lim Kian Leong & Co) for the appellant in Appeal No W-03–116 of 2004.
Wong Chong Wah (Wong Chee Lin with him) (Skrine) for the appellant in Appeal No W-03–117 of 2004.
- H *RS Nathan (R Thayalan with him) (R Thayalan) for the respondent.*

KN Segara JCA:

- I [1] The first plaintiff/respondent, Inokom Corp Sdn Bhd ('Inokom') and the second plaintiff/respondent, Quasar Carriage Sdn Bhd ('Quasar') issued a writ and statement of claim dated 24 June 2003 claiming damages against the first, second and third defendants/appellants, namely, Renault SA

(‘Renault’), Tan Chong Motor Holdings Bhd (‘Tan Chong’) and TC Euro Cars Sdn Bhd (‘TC Euro’) for: A

(a) Breach of contract as pleaded in paras 28 and 29 of the statement of claim;

(b) Breach of fiduciary duties as pleaded in paras 30(1) to 30(16) of the statement of claim; B

(c) Fraudulent misrepresentation/deceit by Tan Chong to Inokom and Quasar to reject the investment for the Kangoo project as pleaded in paras 32(1) and (2) of the statement of claim; C

(d) Renault conspiring with Tan Chong and TC Euro to injure Inokom and Quasar.

[2] By summons in chambers dated 30 July 2003 (encl 11) Renault applied to stay all proceedings in the suit pending reference of the disputes, which are the subject matter of the suit, to arbitration pursuant to s 6 of the Arbitration Act 1952 (‘1952 Act’). The learned High Court judge dismissed the application. Renault appealed and the appeal is registered as W-02–992 of 2004. D
E

[3] By summons in chambers dated 31 July 2003 (encl 13) Tan Chong applied to strike out the statement of claim under O 18 r 19(1)(a) and/or (b) and/or (c) of the Rules of the High Court 1980 and/or the inherent jurisdiction of the High Court. The application was dismissed by the learned High Court judge on 20 May 2004. Tan Chong appealed and the appeal is registered as W-03–117 of 2004. F

[4] By summons in chambers dated 1 August 2003 (encl 15) TC Euro applied to strike out the statement of claim under O 18 r 19(1)(a) and/or (b) and/or (c) Rules of the High Court 1980 and/or the inherent jurisdiction of the High Court. The application was dismissed by the learned High Court judge on 20 May 2004. TC Euro appealed and the appeal is registered as W-03–116 of 2004. G
H

[5] The three appeals were heard together before us without the benefit of any written grounds of judgment of the learned High Court judge. Based on the pleadings, the affidavit evidence and the submissions of the respective counsel for the appellants and respondents before us, we allowed all the three I

A appeals with costs and set aside the orders of the High Court.

APPEAL NO W-02-992 OF 2004

- B [6] On 3 November 1995 Renault, Inokom and Quasar had entered into the master agreement with terms and conditions to govern a co-operation on:
- (a) the import and distribution of Renault built up vehicles in Malaysia by Quasar (Renault project); and
- C (b) the manufacture, assembly, sale and distribution of a Malaysian national light commercial vehicle (Inokom project).

- [7] In connection with the above projects, the parties also executed the following agreements on 20 June 1996 and 6 September 1996, collectively referred to as the operating agreements, namely:
- D (a) Import and distribution agreement — 20 June 1996;
- (b) Parts and component supply agreement — 6 September 1996;
- E (c) Manufacture and distribution license and technical assistance agreement — 6 September 1996;

- [8] On 6 September 1996 Renault also entered into a joint venture agreement with the Berjaya Group Bhd and several other parties, whereupon Renault subscribed to be a minority shareholder in Inokom and agreed that
- F no party shall have any fiduciary obligations to the other.

JOINT VENTURE AGREEMENT (INDUSTRI OTOMOTIF KOMERSIAL (M) SDN BHD)

- G 25.3 Relationship of Parties
- Nothing in this Agreement shall be construed as constituting any of the Parties as a partner, agent or representative of the other. *No Party shall have any fiduciary obligations* to the other arising *out of the ownership of shares* in *Inokom* or from this Agreement.
- H Nothing in this Agreement shall be construed as giving any Party any right or authority to act for or represent or otherwise assume any obligation on behalf of or in the name of any other and each Party agrees to indemnify and hold harmless each of the other from and against any claims losses or damages whatsoever in respect of liabilities incurred as a result of its unauthorized act or representation or assumption on behalf of or in the name of any other.
- I (Emphasis added.)

[9] Under Article 7 of the master agreement, the said agreement shall expire on termination or on the date of expiry of the operating agreements. Under Article 6 the duration of the agreements was for a period of five years from the 'Inokom Commercialisation Authorisation Date'.

A

[10] The 'Inokom Commercialisation Authorisation Date' was on 24 April 1998. Thus, the master agreement and operating agreements expired on 23 April 2003. The agreements were not renewed by Renault — this was documented in notifications:

B

(a) To Inokom by letter dated 7 March 2002; and

C

(b) To Quasar by letter dated 24 October 2002.

[11] Arising from the non-renewal of the master agreement and operating agreements, the claims made against Renault by Inokom and Quasar as pleaded in the suit, are as follows:

D

(a) Breach of the master agreement by Renault by reason of its decision not to renew the agreement for a further term (see para 28 of statement of claim);

(b) Breach of fiduciary duties by Renault by reason of the non-renewal of the master agreement and alleged fraudulent misrepresentation on the Kangoo project (see paras 20–30 of the statement of claim);

E

(c) Fraudulent misrepresentation by Renault in relation to the amount of investment needed for a separate project relating to the manufacture of Renault Kangoo vehicles, namely, the Kangoo project (see paras 32–36 of the statement of claim); and

F

(d) Conspiracy between Renault, Tan Chong and TC Euro to injure and defraud Inokom and Quasar by their negotiations relating to the Kangoo project (see paras 41–42 of the statement of claim).

G

[12] The above allegations by Inokom and Quasar stem from the following:

(a) Alleged failure by Renault to negotiate in good faith to renew the terms of the agreements six months before their expiration;

H

(b)

(i) Alleged fraudulent misrepresentations by Renault as to the USD27m investment required for the Kangoo project in 2000 (unrelated to the Renault and Inokom projects) which resulted in Inokom's and Quasar's decision not to participate;

I

(ii) Negotiations with Tan Chong in a project for the manufacture of

- A Renault Kangoo vehicles for a lesser investment (RM20m) through TC Euro, allegedly discovered by Inokom and Quasar on 23 July 2002.
- B [13] We are unanimous that the dispute between the parties in this case clearly arises from or in connection with the performance or interpretation of the master agreement relating to:
- C (a) its non-renewal, that is, the obligation in Article 6 to discuss in good faith, the extension of the master agreement, six months prior to its expiry; and
- (b) in respect of the allegation of breach of fiduciary duties — the basic issue of whether a fiduciary relationship exists between the parties and whether there is any breach by Renault.
- D [14] Inokom and Quasar seem to suggest, in the pleadings, that the fiduciary relationship is expressly stated in the agreements.
- E [15] Whether or not there was a breach of the master agreement is certainly a dispute which falls squarely within the ambit of the arbitration agreement found in Article 11 of the master agreement which reads:
- F All disputes arising from or in connection with the performance or interpretation of this Agreement shall be settled by the Parties through friendly negotiations between authorized representatives of the Parties. If an amicable solution cannot be reached between the Parties within two (2) months after the beginning of the said negotiations, such dispute shall be submitted to arbitration.
- G [16] The fact that Tan Chong and TC Euro have been named as alleged co-conspirators does not change the fact that a mechanism for resolving disputes between Renault, Inokom and Quasar has been agreed upon. Therefore, mechanism should be rightly invoked and the disputes resolved by arbitration and not by litigation in court. The parties should honour Article 11 and give it life and meaning, to resolve disputes amicably. A devious attempt to circumvent Article 11, by instituting an action against Renault jointly with parties not subject to the arbitration clause, should not be encouraged.
- H [17] The action as between Inokom, Quasar and the alleged co-conspirators (Tan Chong & TC Euro, who were not parties to the arbitration clause) can be stayed pending the outcome of the arbitration.
- I [18] We are not persuaded by counsel for Inokom and Quasar that the disputes are inseparable and unsuitable for determination by an arbitral

proceeding, as it involves third parties to the master agreement who are not subject to the arbitration clause. We are not persuaded that any award made by the arbitral tribunal against Renault would not be binding and enforceable against Tan Chong and TC Euro, to warrant the refusal of stay under s 6 of the 1952 Act. We are further not persuaded that it is undesirable to have two proceedings before two different tribunals, who might reach inconsistent findings, to warrant the refusal of stay under s 6 of the 1952 Act. In any event, Tan Chong and TC Euro have applied to have the claim as against them struck off summarily and if they succeed, multiplicity of proceedings is a non issue.

A

B

C

[19] We have borne in mind that the application by Renault was made pursuant to s 6 of the 1952 Act and that the 1952 Act was repealed with the coming into force of the Arbitration Act 2005 (2005 Act). The 2005 Act came into force on 15 March 2006. Therefore, when the order dismissing the application was made on 15 September 2004, the 2005 Act was not in force yet.

D

[20] No arbitral proceedings under Article 11 of the master agreement have been commenced to date (that is, October 2008, pending our decision on the appeal by Renault).

E

[21] In the above scenario, we are unanimous that the law governing the arbitration agreement under Article 11 of the master agreement is the 2005 Act, and that the 1952 Act no longer has any application to the present case before us, if arbitration is commenced pursuant to the master agreement anytime hereafter, because s 51(2) of the 2005 Act shall be applicable to all proceedings commenced on or after 15 March 2006. Section 51(2) reads:

F

(2) Where the arbitral proceedings were commenced before the coming into operation of this Act, the law governing the arbitration agreement and the arbitral proceedings shall be the law which would have applied as if this Act had not been enacted.

G

[22] The provision on stay of court proceedings pending arbitration is found in s 10 of the 2005 Act. The requirement to stay is *mandatory* unless the court finds that:

H

- (a) the arbitration agreement is null and void, inoperative or incapable of being performed; or
- (b) there is in fact no dispute between the parties with regard to the matters to be referred.

I

A [23] Section 10 of the 2005 Act reads:

(1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds —

B

(a) that the agreement is null and void, inoperative or incapable of being performed; or

C

(b) that there is in fact no dispute between the parties with regard to the matters to be referred.

D

[24] We have taken note that under the 2005 Act there is no equivalent provision to s 25(2) of the 1952 Act which provides that in a dispute which involves the question of whether a party has been guilty of fraud, the High Court shall have power to order that the arbitration agreement shall cease to have effect so far as may be necessary to enable that question to be determined by the High Court. It is indisputable, that under the 2005 Act matters of fraud are no longer to be treated in a special category, and is deemed to be within the competence of arbitrators. Widening the scope of the jurisdiction of arbitrators is certainly consistent with current judicial policy to promote and encourage alternative dispute resolutions in lieu of court litigation.

E

F

[25] In the above circumstances, and a fortiori the 2005 Act, in particular s 10 thereof, we are unanimous that Renault's application for a stay of all further proceedings in the action pending reference to arbitration should be allowed.

G

[26] Now we shall deal with the respective applications by Tan Chong and TC Euro to strike off the writ and statement of claim as against each of them.

APPEAL NO W-03-117 OF 2004

H

[27] Tan Chong asserts that Article 8.2 of the master agreement, under the heading 'Consequences of termination', provides, inter alia, that once termination of the master agreement has been effected, each party thereto shall be entitled to conclude agreements with third parties with a view to manufacture, assemble, sell and distribute Renault vehicles in the territory (Malaysia), as from the effective date of such cessation of the said agreement.

I

[28] By letters dated 24 October 2002 Inokom and Quasar had been informed that the master agreement will not be renewed after its termination

by effluxion of time on 24 April 2003. On 15 May 2003, Renault SAS, that is, Renault's wholly owned subsidiary, entered into a contractual arrangement with TC Euro, a wholly owned subsidiary of Tan Chong, to import and distribute certain models of Renault vehicles.

A

[29] Tan Chong asserts that Inokom and Quasar have made no complaint or claim in so far as it relates to the fact that there had been negotiations between representatives of Tan Chong and Renault for the assembly, sale and distribution of Renault vehicles, prior to the termination by effluxion of time the contractual relationship between Inokom, Quasar and Renault.

B

C

[30] Tan Chong asserts, that based on the statement of claim, there is only one allegation made against Tan Chong — it is in relation to the Kangoo project. Inokom and Quasar allege in the pleadings that Renault and Tan Chong had conspired with each other by unlawful means to injure Inokom and Quasar so as to deprive them the opportunity of developing the Kangoo project. The unlawful means used was allegedly a false and fraudulent representation on the part of Renault as to how much Inokom and Quasar ought to invest in order to develop the Kangoo project. It is asserted that in discussions in the year 2000, Renault had represented to Inokom and Quasar that they had to invest USD27m, whereas in a meeting between representatives of Tan Chong, Inokom, Quasar and Renault, Tan Chong's director had revealed that the investment cost of the Kangoo project for Tan Chong was only RM20m.

D

E

[31] Tan Chong maintains that there is no cause of action in the tort of conspiracy to injure and, that on the undisputed facts and on the facts as pleaded, the claim against Tan Chong is devoid of any substance, equivocal, lacking in precision, inconsistent and improbable in itself. We are unanimous and agree that this is a fit and proper case for the writ and statement of claim to be struck off as against Tan Chong.

F

G

[32] In regard to the tort of conspiracy, the following need to be satisfied at this interlocutory stage:

- (a) an agreement between two or more persons (that is an agreement between Tan Chong and others);
- (b) an agreement for the purpose of injuring Inokom and Quasar;
- (c) that acts done in execution of that agreement resulted in damage to Inokom and Quasar;
- (d) damage is an essential element and where damage is not pleaded the statement of claim may be struck out.

H

I

(see *Yap JH v Tan Sri Loh Boon Siew & Ors* [1991] 4 CLJ (Rep) 243).

- A** [33] It is clear that the very first element to be shown must be an agreement between two or more persons for the purpose of injuring Inokom and Quasar. 'Agreement' is not limited to a signed and sealed agreement but any informal agreement, including a combination of efforts of the alleged co-conspirators. After that, it has to be shown or at least alleged that acts were
- B** done in execution of that agreement which resulted in damage to Inokom and Quasar. In this case, the acts done would have to be unlawful, namely, the alleged false representation made by Renault to Inokom and Quasar as to the level of investment Inokom and Quasar will have to make for the Kangoo project.
- C** [34] It is trite law that the agreement to injure must come first (in other words the agreement should have crystallised), before the alleged unlawful acts are done in execution or pursuant to the agreement.
- D** [35] Inokom and Quasar have pleaded in the statement of claim that the agreement or conspiracy to injure was made sometime in the year 2001 (para 41 of the statement of claim):
- E** 41. Sometime in 2001, the representatives from the 1st and 2nd Defendants wrongfully and maliciously conspired and combined amongst themselves to defraud and to injure the Plaintiffs in their said businesses.
- F** [36] Inokom and Quasar have also pleaded that the alleged representation was first made by Renault during discussions with Inokom and Quasar regarding the Kangoo project in the year 2000 (paras 30(7) and (8) of the statement of claim):
30. ...
- G** (7) In accordance with ..., the Plaintiffs and the 1st Defendant had, sometime in the year 2000, further discussed the possibility of the 1st Plaintiff assembling, manufacturing and distributing the Renault Kangoo model vehicles in Malaysia.
- H** (8) The 1st Defendant had represented to the Plaintiffs that in order for the Renault Kangoo vehicles to be assembled, manufactured and distributed by the 1st Plaintiff in Malaysia, the 1st Plaintiff ought to invest a sum of about USD27 million (equivalent to about RM102.6 million with an exchange rate of 3.8).
- I** [37] Inokom and Quasar have never denied the fact that the alleged representation was first made by Renault to them in the year 2000.
- [38] We are unanimous that there cannot in law and in fact conceivably be an agreement or combination or conspiracy between Renault and Tan Chong

to injure Inokom and Quasar when the alleged representation was pleaded to have been made in 2000 and the alleged conspiracy was pleaded to have occurred in 2001.

A

[39] The alleged representation was made only by Renault to Inokom and Quasar. The court cannot draw, from Inokom's and Quasar's bare allegation that Renault had made the alleged representation to them, an inference or conclusion that Renault and Tan Chong had conspired in any way in the making of the said representation.

B

[40] We are unanimous that there is no cause of action in the tort of conspiracy against Tan Chong. The appeal is allowed. The statement of claim against Tan Chong is struck off.

C

APPEAL NO W-03-116 OF 2004

D

[41] Moving on to consider the appeal by TC Euro with regards to its application to strike off the writ and statement of claim, it is noted that the statement of claim consisting of 45 paragraphs in all, upon being stripped of its extensive assertions against Renault and Tan Chong, has directed only four paragraphs against TC Euro in support of Inokom's and Quasar's RM150,000,000 claim for conspiracy to injure, namely:

E

42. In pursuance and in furtherance of the said conspiracy, the Defendants did the following overt acts, namely:

F

(1) ...

(2) ...

(3) The 3rd Defendants being the wholly owned subsidiary of the 2nd Defendant was to be used as the vehicle to carry out the agreement reached between the 1st and 2nd Defendants.

G

(4) Accordingly, the 1st Defendant had entered into an agreement with the 3rd Defendant appointing the 3rd Defendant as the sole assembler, importer and distributor of Renault vehicles in Malaysia.

H

(5) ...

(6) ...

(a) ...

I

(b) ...

(c) ...

(d) ...

A (e) Therefore, the 1st Defendant had, in furtherance of its conspiracy with the 2nd and 3rd Defendants, made the fraudulent misrepresentation with the intention of injuring the Plaintiffs by depriving the Plaintiffs of the Renault Kangoo project.

B 43. Each of the acts specified in the preceding paragraphs hereof was done by the representatives of the Defendants on behalf of themselves and their co-conspirators in furtherance of the said conspiracy.

C [42] There is no allegation of any overt acts carried out by TC Euro in the pleadings and by necessary implication TC Euro had not carried out any overt acts.

D The gist of the tort of conspiracy is not the conspirational agreement alone but that agreement plus the overt acts causing damage (*Marrinam v Vibart* [1963] 1 QB 234, affirmed [1963] 1 QB 528).

E Pleading. The Statement of Claim should describe who the several parties are and their relationship with each other. It should allege the agreement between the defendants to conspire, and state precisely what was the purpose or what were the objects of the alleged conspiracy, and it must then proceed to set forth, with clarity and precision, the overt acts which are alleged to have been done by each of the alleged conspirators in pursuance and in furtherance of the conspiracy; and lastly, it must allege the injury and damages occasioned to the plaintiff thereby. (THE COMMON LAW LIBRARY — Number 5 — PRECEDENTS OF PLEADINGS — Section 26 — CONSPIRACY).

F [43] It is to be noted that besides the absence of allegations of overt acts on the part of TC Euro the statement of claim has also failed to plead the agreement between the defendants to conspire and state precisely what was the purpose or what were the objects of the alleged conspiracy. The statement of claim has also failed to set forth with clarity and precision the overt acts which are alleged to have been done by each of the alleged conspirators in pursuance and in furtherance of the conspiracy.

H [44] According to the *Oxford Advanced Learner's Dictionary*, (7th Ed), 'conspiracy' means 'a secret plan by a group of people to do something harmful or illegal'.

I [45] Inokom and Quasar had knowledge of the level of investment intended to be put in by Tan Chong and this is patent from the pleadings at para 42(6)(c):

During a meeting on 23 July 2002, it was brought to the attention of the plaintiffs that the total investment to be made by second defendant for the assembly and manufacture of the Renault Kangoo vehicle is only about RM20m instead of the sum of about USD27m quoted to the plaintiffs.

[46] There are three implications from the above paragraph, namely:

- (a) That Tan Chong had been in negotiation with Renault for the Renault Kangoo project, was already known to Inokom and Quasar;
- (b) That Tan Chong was to invest RM20m into the project;
- (c) That the above information was brought to the attention of Inokom and Quasar ('brought to the attention of the plaintiffs'). They did not come to know of it by chance or by reason of somebody letting the cat out of the bag on information (secret) they ought not to know.

[47] Going by the dictionary definition of 'conspiracy' there could never have been any conspiracy when all element of secrecy is lost, because Inokom and Quasar themselves were informed and had full knowledge of Tan Chong's action.

[48] We are unanimous that there is no cause of action in the tort of conspiracy as against TC Euro. The statement of claim is vexatious and frivolous. Just as fraud must be pleaded with great particularity, so must the constituent ingredients of the alleged conspiracy by TC. Euro be pleaded. In the circumstances, for reasons already stated, the appeal is allowed and the statement of claim against TC Euro is struck off.

All three appeals allowed with costs.

Reported by Kanesh Sundrum

A

B

C

D

E

F

G

H

I